IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Article 138 (1) (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with High Court of Special Provisions Act no.19 of 1990.

Officer in Charge,
Police Station,
Weligapola.

Plaintiff

Vs.

Court of Appeal Application
No: **CA (PHC) 231/2018**

High Court of Ratnapura
No: **RA 43/2014**

Magistrate's Court of
Balangoda
No: **40113**

Pelenda Widanelage Suresh Keerthi,
5th Mile Post,
Ambewila,
Pallebedda.

Defendant

And Between

Kukulage Upul Shantha Samarakoon,
Badullegama,
Ranwala,
Godakawela.

Claimant-Petitioner

Vs.
Officer in Charge,
Police Station,
Weligepola.

Plaintiff-Respondent

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

02nd Respondent

Pelenda Widanalage Suresh Keerthi,
5th Mile Post,
Ambewila,
Pallebedda.

Defendant - 03rd Respondent

And Now Between

Kukulage Upul Shantha Samarakoon,
Badullegama,
Ranwela,
Godakawela.

Claimant-Petitioner-Appellant

Vs.

Officer in Charge,
Police Station,
Weligapola.

Plaintiff-Respondent-Respondent

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

2nd Respondent-Respondent

Palenda Widanalage Suresh Keerthi,
5th Mile Post,
Ambewila,
Pallebedda.

Defendant 3rd Respondent-Respondent

Before	:	Menaka Wijesundera J Neil Iddawala J
Counsel	:	Sanjaya Seneviratne for the Appellant. Indika Nelummini, SC for the Respondent.
Written Submissions on	:	08.03.2022 by the Respondent 23.05.2022 by the Appellant
Decided on	:	11.10.2022

Iddawala – J

This is an appeal against the order dated 28.08.2018, delivered by the Provincial High Court of the Sabaragamuwa Province holden in Ratnapura, which acted in revision and affirmed the vehicle confiscation order of the learned Magistrate of Balangoda dated 21.01.2014, under the Forest Ordinance. The claimant-petitioner-appellant (*hereinafter the appellant*) has preferred the instant appeal to this Court in order to have both the orders set aside, and thereby disallow the confiscation of the vehicle bearing vehicle registration no. SG HW-4610.

The facts of the case are briefly as follows. The accused-defendant (*hereinafter the accused*) was charged in the Magistrate Court of Balangoda for the transportation of Timber (Teak) without a valid permit, and thereby acting in contravention of the law set out in the Forest Ordinance, as amended by Amendment Act, No. 65 of 2009 (*hereinafter Act*), under Section 25(2) read with Section 40 of the Act.

The Magistrate Court of Balangoda framed charges against the accused on 31.01.2012. The accused pleaded guilty and upon conviction, the learned Magistrate imposed a fine of Rs 7500/= on the accused. An inquiry was held by the learned Magistrate to show cause as to why the vehicle in question should not be confiscated, pursuant to which the appellant (the registered owner of the vehicle) and a witness named Hettiarachchilage Chaminda Dassanayake, gave evidence. After the conclusion of the evidence, the learned Magistrate ordered the vehicle to be confiscated for want of precautionary measures on the part of the registered owner of the vehicle, as the burden of proof was not discharged to the satisfaction of the Court, as per the law set out in the Act.

Aggrieved by the said decision, the appellant filed a revision application in the High Court of Ratnapura, which reaffirmed the order of the learned Magistrate. Hence the appellant has preferred the instant appeal to the Court of Appeal to set aside the order dated 21.01.2014, delivered by the Magistrate Court and the subsequent order dated 28.08.2018 delivered by the High Court.

Before embarking upon the merits, the law pertinent to the application merits being reproduced in the following manner:

> *"40(1) Where any person is convicted of a forest offence—*
>
> > *(a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and*
> >
> > *(b) all tools, vehicles, implements, cattle and machines used in committing such offence,*

shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate:

Provided that in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no Order of Confiscation shall be made if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence." (Emphasis added)

Accordingly, the legislation on forest conservation has cast an indispensable burden on the third party to an offence coming within the purview of Section 40 of the Ordinance, to dispense the burden of proving to the satisfaction of the court that he/she, as the owner of the vehicle in dispute, has taken necessary precautionary measures to preclude the vehicle from being employed in acts of crime. Therefore, this Court will primarily look into the contention whether the learned Magistrate has correctly applied the relevant legal provisions and evaluated the evidence presented before the court, in arriving at the final determination that the appellant has failed to dispense the said burden.

The learned Magistrate in delivering his order has examined the evidence submitted by the appellant and the witness, to arrive at the decision that there are discrepancies between the evidence submitted by the said parties, due to which the required burden has not been discharged to the satisfaction of the Court.

The cross-examination conducted on the witness during the inquiry revealed that the vehicle has been in the control and possession of the witness. According to the witness, by way of a verbal contract between the appellant and the witness, the appellant has ceded control of the vehicle in question to the witness, upon him paying an amount of Rs. 825 000 to the appellant. The appellant has also intimated that its legal ownership

will be transferred to the witness in the future. An amount of Rs. 800 000 has so far been paid by the witness to the appellant. Further, the witness claimed that he hired the accused as the driver for the vehicle in dispute, thus asserting that he wielded actual control of the vehicle.

However, the appellant, despite the transfer of possession of the vehicle to the witness, continued as the registered owner of the vehicle. He claimed that he was in control of the vehicle and that it was him who hired the accused to drive the vehicle. Thus, the Magistrate Court and the High Court have not taken into consideration, the averments of the appellant because of the above adduced contradictory evidence by the appellant and the witness.

Nonetheless, this Court further observes that, the appellant during the cross-examination has admitted in the Magistrate Court that the sale of his vehicle to the witness transpired after the said offence has been committed by the accused (Page 102 of the Appeal Brief), which further contradicts the evidence submitted by the witness with regards to his control over the vehicle during the commission of the offence by the accused.

Therefore, this Court is of the opinion that given the discrepancies in the evidence submitted by the witness and the appellant, the averment of the appellant that he took all necessary precautions to prevent the occurrence of a crime cannot be accepted. The disparity in the claims of the appellant and the witness, taints the appellant's contention that he took precautionary measures to prevent the vehicle from being employed in acts contravening the law. Thus, it is not clear to this Court as to who wielded control over the vehicle between the witness and the appellant.

The appellant as the documented registered owner, averred that he neither had any knowledge of the diversion of the vehicle nor of the offence committed, which does not suffice to dispense the burden cast on him by the Act, to establish to the satisfaction of the court that he had taken

necessary precautionary measures to avert the offence committed by the accused. As held in **S. D. N. Premasiri v Officer in Charge, Mawathagama** C A (PHC) 46/2015 Court of Appeal Minute dated 27.11.2018 *"...it is imperative to prove to the satisfaction of Court that the vehicle owner in question has not only given instructions but also has taken every possible step to implement them"*

In **Jalathge Surasena v Officer in Charge, Police Station of Hikkaduwa CA (PHC) APN 100/2014**, Minute dated 30.06.2015, it was held that a mere denial of not having knowledge of the offence committed is not sufficient to discharge the burden cast on a registered owner of a vehicle. In the instant application, neither the appellant (the registered owner of the vehicle) nor the witness (current owner of the vehicle) have shown cause so as to satisfy the Court that either one of them has taken the necessary precautionary measures to prevent the offence, thereby discharging the burden cast on them, on a balance of probability. Hence, the appellant's contention that he had no knowledge of the offence being committed itself brings to light the lax precautions taken by the registered owner, and further affirms the fact that he has not taken satisfactory precautions to prevent the vehicle from being employed in acts of crime, as a responsible owner of a vehicle.

With the implementation of the Amendment Act, No. 65 of 2009, a higher degree of burden of proof is set upon the owner of the vehicle. As per the law set out in the amended Section 40 of the Act, the owner of a vehicle must prove on a balance of probability that he has taken every possible precautionary measure to prevent such an offence being committed. Merely giving instructions or claiming lack of knowledge of the diversion of the vehicle does not suffice to discharge the burden placed upon an owner by this amendment.

Therefore, owing to the failure of either party to prove on a balance of probability, the prevalence of precautionary measures taken by them, to the satisfaction of this Court, and the failure to dispense the burden cast

on the owner of a vehicle, this Court is of the view that there is no irregularity or illegality in the order delivered by the learned Magistrate. The learned High Court Judge has correctly dismissed the revision application. Accordingly, we see no reason to interfere with the order of the learned High Court Judge dated 28.08.2018 and the confiscation order of the learned Magistrate dated 21.01.2014.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL